BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

GRIEVANT,	)	
	)	
Employee/Grievant,	)	**DOCKET No. 12-07-552**
	)	
v.	)	
	)	**DECISION AND ORDER**
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	PUBLIC DECISION (redacted)
	)	
Employer/Respondent.	)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on August 15, 2013 at the Public Service Commission, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, Dr. Jacqueline Jenkins, Victoria D. Cairns, John F. Schmutz, and Paul R. Houck, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Grievant
Employee/Grievant *pro se*

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Health and Social Services

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board introduced into evidence thirteen documents marked for identification as Exhibits A-K, M, O, and P. [1]

DHSS called one witnesses: Genelle Fletcher, Senior Vocational Counselor, Division for the Visually Impaired.

The employee/grievant, Grievant, did not offer any documents into evidence. The Grievant testified on her own behalf but did not call any other witnesses.

FINDINGS OF FACT

The Grievant worked as an Administrative Specialist I at the Division for the Visually Impaired (DVI). In March 2010, Genelle Fletcher became the Grievant's immediate supervisor.

In the Grievant's performance review for the period March 10 to October 7, 2010, Fletcher rated the Grievant as "Meets Expectations." However, under areas for growth or improvement, Fletcher noted: "It is expected that [the Grievant] will continue to improve on her punctuality and adhering to DVI's dress code policy."

According to Fletcher, the Grievant's attendance continued to be "sporadic" during 2011 after her 2010 performance review. On March 8, 2012, DVI suspended the Grievant for one day without pay for leaving work without authorization, for excessive tardiness, and for failure to follow directives for using her electronic swipe badge to enter and leave the building.

On March 24, 2011, Fletcher met with the Grievant "to address work related issues."

[1] In the Pre-Hearing Order, the Board excluded what was then marked for identification as Exhibit L (Letter dated March 8, 2012 suspending the Grievant for one-day for tardiness, failure to comply with directives regarding badge swiping, and being absent during work hours). At the hearing, the Board admitted this document as Exhibit P for the limited purpose of showing that the Grievant's one-day and three-day suspensions were for similar misconduct.

Fletcher expressed concerns about the Grievant's "whereabouts throughout the day" and "your habitual tardiness." Fletcher noted that between February 23 and March 23, 2011, the Grievant was late for 12 out of 19 work days, and on 10 of those 12 days she was late for more than eight minutes (for which she could be docked pay). Fletcher told the Grievant: "If you anticipate being late you are to notify me via telephone by 8AM. If you do not reach me, you are to speak to a live person that will notify someone on the VT team of your late arrival." Fletcher also directed the Grievant at all times "to swipe your badge when entering and leaving the building."

According to Fletcher, the Grievant's attendance continued to be sporadic. Because of work/family issues, the Grievant requested a flexible work schedule. On November 1, 2011, Fletcher approved a schedule for the Grievant to work 8-5:15 p.m. with leave each day from 3-4:15 p.m. to pick up the Grievant's children. Fletcher advised the Grievant: "It is expected that you report promptly to your work station at 8AM. Excessive tardiness will result in docked pay in accordance with state merit rules." Fletcher also directed the Grievant "to badge in and out each time you leave the building."

On March 5, 2012, DVI again accommodated the Grievant's request for a flextime work schedule allowing her to work from 8:30-5:00pm (with one hour for lunch).

On May 17, 2012, the Grievant left a voice mail message for Fletcher at 6:45 a.m. saying she would be late for work because she had to go to HR. Fletcher never showed up for work or went to HR. In the Grievant's Employee Annual Leave Report, DVI recorded the Grievant as "AWOL" for 7.5 hours on May 17, 2012. The Grievant signed the report on July 19, 2012 attesting that "I agree with the above balances."

On June 20, 2012, the Grievant called Fletcher at 8:26 a.m. to say she would be late because of "traffic and would have to reroute." Thirty minutes later, the Grievant called back to

say she would not be in until "after lunch around 12:30 pm" because "of my children." The Grievant did not show up for work at all that day. In the Grievant's Annual Leave Report, DVI recorded the Grievant as "AWOL" for 7.5 hours on June 20, 2012. The Grievant signed the report on July 19, 2012 attesting that "I agree with the above balances."

On June 26, 2012, DVI suspended the Grievant for three days without pay. The suspension letter cited the Grievant's failure to appear for work on May 17 and June 20, 2012. DVI also based the suspension on the Grievant's failure to comply with badge swiping directives; excessive tardiness (she was more than eight minutes late for work ten times between May 2 and June 4, 2012); and her previous one-day suspension for similar work attendance issues. DVI noted that "You have been provided with an alternative work schedule in an attempt to accommodate your needs; however, this has not led to improvements."

The Grievant claims that DVI approved her for intermittent leave under the Family Medical Leave Act (FMLA) to care for her son who has a "medical condition." The Grievant claims that on every absentee/tardy date cited in the three-day suspension letter she was taking authorized intermittent leave to care for her son.

The Grievant did not provide the Board with any documentation of what type of intermittent leave DVI approved. The Grievant did not provide the Board with documentation to show that each time she was absent or late for work, she needed to care for her son within the parameters of her approved intermittent leave: to care for a child's serious health condition, rather than the normal care of a child who comes down with a cold or has a routine doctor's appointment.

The Grievant claims that Fletcher was "out to get her" and that DVI did not require any other employee to swipe their card every time they entered or left the building. The Grievant did

not identify any other employee by name, or present any evidence that another employee failed to adhere to the same directive as the Grievant. Based on the Grievant's attendance track record, the Board believes that DVI was well within its management rights to impose special requirements on the Grievant to hold her accountable for her whereabouts.

The Grievant claims that she never received an unsatisfactory performance evaluation and her absences from work never impaired her ability to do her job. But as Fletcher pointed out, the Grievant was the first point of contact for the agency: for clients walking or calling in needing assistance or direction regarding services. When the Grievant was not at her desk doing her job, someone else had to step in to cover.

The Board finds as a matter of fact that the Grievant did not have a good excuse for not showing up for work on May 17 or June 20, 2012.

The Board finds as a matter of fact that the Grievant did not comply with DVI directives regarding the use of her swipe card when leaving and entering the building.

The Board finds as a matter of fact that the Grievant was late for work 29 times between April 26 and June 14, 2012. [2]

The Board finds as a matter of fact that DVI counseled the Grievant on several occasions about her attendance issues and twice adjusted her work schedule to accommodate her family commitments, to no avail.

The Board finds as a matter of fact that DVI suspended the Grievant for one day without pay on March 8, 2012 for similar attendance issues.

[2] The Board has some concerns as to why DVI waited almost two months to address the Grievant's habitual tardiness after an audit of her swipe card logs.

CONCLUSIONS OF LAW

Merit Rule 12.1 provides:

> **Employees shall be accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the circumstances.**

The Board concludes as a matter of law that DVI had just cause to suspend the Grievant for three days for excessive tardiness, absenteeism, and failure to comply with directives for using her electronic swipe card. Between April 16 and June 19, 2012, the Grievant was only on time for work ONE day.

In *Lofland v. Unemployment Insurance Appeals Board*, 1989 WL 89681 (Del. Super. July 17, 1989), *aff'd*, 568 A.2d 1072 (1989) (TABLE), the employer terminated Lofland after 4 ½ weeks for tardiness and absenteeism. During that time, she was tardy on eight days, and failed to follow the employer's call in procedure on four other days when she was absent from work. The Superior Court held that the employer had just cause to discharge the employee. "The employee's expected standard of conduct was to be at work on time, and to let the Employer know in advance of the absence or tardiness. The record reflects that Claimant failed to do this approximately 50% of the time she was employed." 1989 WL 89681, at p.2.

The Grievant claims that DVI did not provide her with any counseling or time management training. But Fletcher testified that she counseled the Grievant on at least three occasions about her attendance issues (on March 24, November 3, and December 28, 2011). The Board does not believe that an employer has any obligation to provide special training to

adult employees to make them aware that it is their responsibility to show up for work, on time and, if they are unable to do so, to follow the employer's call in policy. "[I]t should be unnecessary for an employer to notify an employee that the employee is expected to refrain from being absent from the workstation, without excuse, for several hours at a time. It is implied in the employment relationship that the employee will work during the designated hours." *McKoy v. Department of Labor*, C.A. No. 97A-02-2-RRC, 1997 WL 819135, at p.2 (Del. Super., Oct. 16, 1997).

DECISION AND ORDER

It is this **22nd** day of August, 2013, by a unanimous vote of 5-0, the Decision and Order of the Board to deny the Grievant's appeal.

MARTHA K. AUSTIN, MERB Chairwoman

VICTORIA D. CAIRNS, MERB Member

JOHN F. SCHMUTZ, MERB Member

PAUL R. HOUCK, MERB Member

JACQUELINE D. JENKINS, EDD, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **August 22**, 2013

Distribution:
Original: File
Copies: Grievant
Agency's Representative
Board Counsel